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No. 243

In the Supreme Court of the United States

OCTOBER TERM, 1968

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS INCORPORATED, ARDEN PUBLISHING COMPANY AND WILLIAM A. SMALL, JR.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Arizona.

MEMORANDUM OF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

ROBERT L. STERN
231 South LaSalle Street
Chicago, Illinois 60604
Attorney for *Amici Curiae*

Of Counsel:
MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT
Chicago, Illinois

McCORMICK & HENDERSON, INC., CHICAGO

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This Memorandum urging the Court to note probable jurisdiction is presented on behalf of a number of news-

paper publishers, as *amici curiae*.[1] The consent of the parties to the filing of this Memorandum has been filed with the clerk of the Court.

The publishers for whom this Memorandum is submitted have operating agreements similar in many respects to that held unlawful by the District Court in this case.[2] These agreements are in effect in communities ranging in size from 27,000 (Franklin-Oil City, Pennsylvania) to 740,000 (San Francisco, California).[3]

The communities with newspapers printed under operating agreements represent a cross-section of the country, geographically as well as in terms of population. They

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[1] Albuquerque (N. Mex.) *Journal*, Albuquerque *Tribune;* Birmingham (Ala.) *News*, Birmingham *Post-Herald;* Bristol (Va.) Newspaper Printing Corp.; Charleston (W. Va.) *Daily Mail*, Charleston *Gazette;* Columbus (Ohio) *Citizen-Journal;* Oil City (Pa.) *Derrick;* Franklin (Pa.) *News-Herald;* Deseret News Publishing Co. (Salt Lake City, Utah); El Paso (Tex.) *Herald-Post*, El Paso *Times;* Evansville (Ind.) *Press;* Ft. Wayne (Ind.) *News Sentinel;* Knoxville (Tenn.) *New-Sentinel;* Nashville (Tenn.) *Banner*, Nashville *Tennessean;* Pittsburgh (Pa.) *Press;* Salt Lake City (Utah) *Tribune;* San Francisco (Calif.) *Chronicle*, San Francisco *Examiner;* Tulsa (Okla.) *Daily World*, Tulsa *Tribune.*

[2] The operating agreements, of course, differ in a number of respects both among themselves and as compared to the Tucson agreement; however, all provide for a merger or consolidation of mechanical, circulating and advertising functions as a means of reducing costs.

[3] All populations referred to in this Memorandum are from the most recent official census, taken in 1960 by the Bureau of the Census, United States Department of Commerce (U.S. Bureau of the Census. *U. S. Census of Population: 1960*, Vol. I, *Characteristics of the Population*, Part A, Number of Inhabitants. U.S. Govt. Printing Office, Wash., D.C., 1961).

include, among others, Charleston, West Virginia (85,796); Madison, Wisconsin (126,706); Lincoln, Nebraska (128,521); Ft. Wayne, Indiana (161,776); Shreveport, Louisiana (164,372); Salt Lake City, Utah (189,454); Albuquerque, New Mexico (201,189); Tulsa, Oklahoma (261,685); Miami, Florida (291,688); Honolulu, Hawaii (294,194); Birmingham, Alabama (340,887); Columbus, Ohio (471,316); and Pittsburgh, Pennsylvania (604,332).[4]

Tucson, with a population of 212,892, falls near the middle.

This case presents the question whether an arrangement essential to the preservation of competing newspapers in many communities violates the antitrust laws. More precisely, is a merger of the business operations of two newspapers unlawful where the purpose and effect is to permit a continuation of competition in the news and editorial departments, and the alternative would be the survival of only one of the papers. Under the Government's theory, adopted by the court below, all such agreements are illegal *per se*.

This question is of importance not only to the publishers of newspapers in Tucson and many other cities, but also to the public interest in having newspapers owned by different publishers presenting different viewpoints—a First Amendment interest (*United States* v. *Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y., 1943), affirmed, 326 U.S. 1 (1945)) which complements the public interest in competition.

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[4] There are some 22 communities in which competing daily newspapers are produced pursuant to operating agreements which provide for common production, advertising and circulation departments (Tr. 847-848).

In most cities of the same size as Tucson as well as many much larger, in which there formerly were competing newspaper publishers, one of the papers has either completely suspended or, instead, been absorbed by the surviving publisher—in either event leaving one publisher to serve the community. This has been the result not of design but of nationwide economic forces, in particular the loss of advertising revenue to other media and the rapid increase of newspaper production costs.[5] The interrelation between advertising revenues and circulation results in a downward spiral of the less successful paper.[6] Loss of circulation leads to a decline in advertising lineage (or vice versa). This in turn leads to inability to generate sufficient revenues to finance news and editorial operations, a further loss of circulation, and eventually a disappearance of the weaker newspaper as a viable competitor. The newspaper industry is peculiarly susceptible to these forces, as experience in most American cities has demonstrated.

In these circumstances, resorting to an operating agreement is the only alternative to a complete merger or suspension of the otherwise failing newspaper. This alter-

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[5] The trend toward the extinction of newspaper competition described in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 603-04 (1953), has continued (Deft. Ex. 139). As of 1963 only five of 33 metropolitan areas with populations between 650,000 and 300,000 (substantially larger than Tucson) had two newspaper publishers, and in three of these five areas the papers were published in different cities within the area (Deft. Ex. 126).

[6] The District Court specifically found that "quality, circulation, and advertising revenues of a newspaper are interrelated," and that there would be an upward or downward spiral effect if the quality of the newspaper improved or declined. Finding 68.

native, which permits different viewpoints to continue to be presented by competing publishers, is obviously more compatible with the public interest and the objectives of the antitrust laws than the elimination of competition altogether.

The point of vital import not only to these *amici* but also to other newspapers and to the general public, in view of the *per se* ruling below, is whether *any* arrangement is lawful which will as a practical matter enable editorial and news competition to survive where fully competing newspapers cannot. The District Court, however, has characterized an agreement which provides for a single business department and a distribution of the revenues of that department as "price fixing" and "profit pooling" and therefore unlawful *per se,* in disregard of the competition-preserving context in which the agreement was made. This holding, if affirmed without substantial qualification, will destroy the essence of the joint operating plans which have enabled our communities to retain competing newspapers expressing different points of view.[7]

When, as here, one of the newspapers would have failed and thus be unable to continue in competition, the merger, of course, does not eliminate price competition. But the

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[7] The trial court also relied upon the provision in Section 3 of the 1940 agreement that the Star and the Citizen, or their shareholders, officers and executives will not "engage in any other publishing business" in the area or in any other "business that will or can in any way conflict with the successful operation of the business of the parties to the agreement." This provision is not essential to the joint plan of operation. Furthermore, if a community cannot successfully support two competitive newspapers, it cannot support three.

Government and the trial court ignore this and assert that the mere operation of a single business department covering advertising and circulation, *inter alia*, constitutes "price fixing" and therefore is unlawful *per se*. This cannot be true, for it would make illegal every horizontal merger or similar arrangement in which the prices of the products sold were established by the merged entity, although up to now that has not been the law, particularly where a failing business is concerned. *Brown Shoe Company* v. *United States*, 370 U.S. 294, 319, 331; *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291.

Where two companies join in a single enterprise the revenues of the enterprise will normally be distributed in some way among its owners, who will be the constituent companies or their stockholders. The Government labels this distribution of revenues as "profit pooling," and says that this in itself causes the merger of newspaper business departments to be unlawful *per se*. But if a division of revenues is unlawful *per se*, then all mergers and joint enterprises would be unlawful. This, of course, makes no sense. Clearly unless the joint enterprise is unlawful in itself—and this is determined under the rule of reason—it should not become so simply because the revenues are divided and distributed among its owners.

The Government also ignores the realities of newspaper publication. All newspaper revenues must come from the advertising and circulation departments. In the case of newspapers which are parties to an operating agreement, the revenues of the single business department thus support the editorial as well as the commercial activities. They must be distributed between the two publishers so that the costs of the former can be met. Such distribution of the revenues does not constitute "profit pooling" in any relevant sense.

The court below accepted the Government's argument that what it characterizes as "profit pooling" is unlawful in all circumstances, but this position is supported neither by the authorities relied upon by the Government nor by any other. *United States* v. *Paramount Pictures,* 66 F. Supp. 323, 350-51 (S.D. N.Y., 1946), affirmed, 334 U.S. 131, and *Northern Securities Co.* v. *United States,* 193 U.S. 197, 326-27, the two decisions cited by the Government, were cases in which companies perfectly capable of effective competition had entered into otherwise unlawful combinations, which, *inter alia,* pooled their profits. There was no statement in those cases that apart from the other circumstances rendering the combination illegal, the distribution of receipts in designated ratios will always or *per se* be unlawful, and, indeed, none of the familiar listings of *per se* violations in the opinions of this Court or in other writings include "profit pooling."[8] A division of profits may well be unlawful in the context of a combination without legal justification, but certainly this is not true of a merger lawful because a business is failing or for other reasons.

The court below did not deny that the Citizen was losing money and had lost money for many years at the time of the 1940 agreement. Indeed, at one time the Court agreed that a complete merger of the two Tucson newspapers

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[8] *White Motor Co.* v. *United States,* 372 U.S. 253, 259-260, 281: *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 5; *United States* v. *Sealy Mfg. Co.,* 388 U.S. 350, 358; *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172, 178; Oppenheim & Weston, *Federal Antitrust Laws: Cases and Comments,* 18 (1968).

would have been lawful for that reason.[9] But the Court accepted the Government's theory that the 1940 agreement was not a merger, since the two papers remained separate in their news and editorial activities, and that since the failing business doctrine had been applied only to mergers, it was inapplicable.

This converts a principle based on economic and legal substance into one of semantics. The failure to combine the editorial departments provides no reason for not treating the joinder of the business departments as a merger, which it was. The Government's argument that the rules governing mergers, including the failing company doctrine, should not apply to a partial merger thus has no rational basis in antitrust policy.

The acquisition of a failing company by a competitor has been permitted because a company which fails will no longer be a "competitive factor in the market" (*Brown Shoe*, 370 U.S. at 319), and because the preservation of the enterprise in some viable form mitigates the otherwise injurious consequences to the shareholders "and the community where its plants were operated" (*International*

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[9] "Mr. MacLaury: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?

"The Court: I would say that—

"Mr. MacLaury: Assuming all the other factors.

"The Court: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition." (Transcript of February 15, 1967, p. 412.)

Shoe, 280 U.S. at 302). The same reasons dictate that if an important part of the enterprise can be preserved as a competitive force, it should be. To permit a merger of all the activities of a failing company but not of only a part, in a way which enables the remainder to stay competitive, makes no antitrust sense—and is certainly not compelled by the antitrust statutes. But that is what the court below has done.

In short, the Government has persuaded the court below to accept an "all or nothing" approach—a complete merger of all departments being legal, but a merger of everything except news and editorial departments being illegal. Preserving competition thus becomes a vice, not a virtue.

The record establishes, and it is well known, that economic pressures have left only a single newspaper publisher in most American cities. See p. 4, *supra.* In cities in which there are operating arrangements, which constitute over a third of the few communities which still have newspapers owned by different interests, newspapers published by different owners and therefore able to present different points of view have survived *only* because of the economies resulting from a merger of the business departments. Arrangements which have a result so beneficial to the interest in competition which the antitrust laws protect, as well as to other public interests, clearly fall within the reasoning of the cases, as well as of the legislative materials cited in the *Brown Shoe* case, which permit a failing company to merge with a competitor.

The record here demonstrates without contradiction[10]

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[10] The District Court granted the Government's motion for summary judgment on the ground that the 1940 agreement was a *per se* violation of Section 1 of the Sherman Act, refusing to include the question of Section 1 violation

that the evening paper in Tucson, the Citizen, which has no Sunday edition, cannot survive if it is compelled to support separate advertising and circulation departments in competition with the Star. The significant point for these *amici,* however, is not only what *this* record shows, but that this Court recognize that advertising and circulation departments *may* lawfully be merged when in fact the savings from joining these departments, as well as the printing departments, are necessary to the survival of otherwise separate papers. These *amici* know that such is the situation in the cities in which they operate, and believe that to hold otherwise would be to insure that virtually every city in which an operating arrangement exists inevitably will become either a one newspaper city or a city in which newspapers are published under single ownership.

These *amici* submit therefore that since the court below held the critical provisions of the 1940 agreement invalid *per se,* thereby defeating the only workable method for *preserving* competition in many cities, the case raises questions of substance and importance which this Court should resolve. Whether operating agreements be technically regarded as mergers or not, they should be sustained under the rule of reason. For if they are held invalid, the public interest in competition and in the expression of divergent views will be seriously impaired.

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among the issues to be tried. The defendant made an offer of proof, based in part on testimony admitted on other issues. For purposes of determining whether summary judgment should have been granted, the evidence offered by defendants and their offer of proof must be accepted as true.

For these reasons the effect of the District Court's judgment upon the *amici*, and others similarly situated, warrants a plenary hearing on the merits. We urge that probable jurisdiction be noted.

Respectfully submitted,

ROBERT L. STERN
Attorney for Amici Curiae
231 South LaSalle Street
Chicago, Illinois 60604

Of Counsel:
MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT
Chicago, Illinois